BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Resolution Regarding the Development of New Regulations Regarding Public Access to Records of the California Public Utilities Commission and Requests for Confidential Treatment of Records	Draft Resolution No.: L-436

COMMENTS OF THE COMMUNICATIONS INDUSTRY COALITION ON REVISED DRAFT RESOLUTION L-436 AND PROPOSED GENERAL ORDER 66-D ISSUED DECEMBER 14, 2012

Nelsonya Causby
General Attorney
AT&T Services, Inc.
525 Market Street, Suite 2025
San Francisco, California 94705
Telephone: 415.778.1488
Email: lc6239@att.com

For AT&T

Lesla Lehtonen
Sr. Vice President and General Counsel
California Cable & Telecommunications Association
1001 K Street, 2nd Floor
Sacramento, California 95814
Phone: 916.446.7732
Email: Lesla@calcable.org

For the California Cable & Telecommunications Association

Anita Taff-Rice
1547 Palos Verdes No. 298
Walnut Creek, California 94597
Telephone: 415.699.7885
Email: anita@icommlaw.com

For **tw telecom of california lp** and ExteNet Systems (California) LLC

Charles Born
Manager, Government & External Affairs
9260 E. Stockton Blvd.
Elk Grove, California 95624
Telephone: 916.686.3570
Email: Charlie.Born@ftr.com

For Frontier Communications

Mark P. Schreiber
Patrick M. Rosvall
Lisa P. Tse
COOPER, WHITE & COOPER LIP
201 California Street, 17th Floor
San Francisco, California 94111
Telephone: 415.765.0369
Email: prosvall@cwclaw.com

For the Small LECs and SureWest Telephone

Douglas Garrett
Esther Northrup
5651 Copley Drive
San Diego, California 92111
Telephone: 858.836.7308
Email: Esther.northrup@cox.com

For Cox California Telcom, LLC

Rudolph M. Reyes
Assistant General Counsel
Verizon West Region
201 Spear Street, 7th Floor
San Francisco, California 94105
Telephone: 415.228.1465
Email: rudy.reyes@verizon.com

For Verizon

Jeanne B. Armstrong
GOODIN, MACBRIDE, SQUERI, DAY & LAMPREY, LLP
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: 415.392.7900
Email: jarmstrong@goodinmacbride.com

For CTIA-The Wireless Association®

Dated: January 11, 2013

I. INTRODUCTION

In accordance with the timeframe for comments outlined in the Legal Division letter dated December 14, 2012, as modified by the subsequent letter extending the deadline for filing comments dated December 19, 2012, AT&T,[1] the California Cable and Telecommunications Association, Cox California Telcom, LLC, CTIA-The Wireless Association®, ExteNet Systems (California) LLC, Frontier Communications,[2] the Small LECs,[3] SureWest Telephone, **tw telecom of California lp**, and Verizon[4] (collectively, the "Communications Industry Coalition" or "CIC") offer these Comments on the Revised Draft Resolution L-436 issued December 14, 2012 ("Draft Resolution").

CIC appreciates the opportunity to offer these further comments on the issues raised in the Draft Resolution. Insofar as it defers adoption of the Proposed General Order ("G.O") 66-D , the Draft Resolution has been improved. Unfortunately, the Draft Resolution continues to prejudge issues that have not been fully developed. The Draft Resolution is now nearly 200 pages long, but the same legal infirmities and confusing and burdensome procedures found in prior versions of the Draft Resolution remain. The Draft Resolution would violate Public

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[1] As used herein, "AT&T" refers to the following AT&T entities: Pacific Bell Telephone Company d/b/a AT&T California (U 1001 C), AT&T Corp. (U 5002 C), and Teleport Communications America, LLC (U 5454 C).

[2] As used herein, "Frontier Communications" refers to the following entities: Citizens Telecommunications Company of California Inc. d/b/a Frontier Communications of California (U 1024 C), Frontier Communications West Coast Inc. (U 1020 C), and Frontier Communications of the Southwest Inc. (U 1026 C).

[3] The Small LECs are the following companies, all of which are small, rural ILECs serving rural and remote parts of California: Calaveras Telephone Company (U 1004 C), Cal-Ore Telephone Co. (U 1006 C), Ducor Telephone Company (U 1007 C), Foresthill Telephone Co. (U 1009 C), Happy Valley Telephone Company (U 1010 C), Hornitos Telephone Company (U 1011 C), Kerman Telephone Co. (U 1012 C), Pinnacles Telephone Co. (U 1013 C), The Ponderosa Telephone Co. (U 1014 C), Sierra Telephone Company, Inc. (U 1016 C), The Siskiyou Telephone Company (U 1017 C), Volcano Telephone Company (U 1019 C), and Winterhaven Telephone Company (U 1021 C).

[4] Verizon refers to the following Verizon entities: Verizon California Inc. (U 1002 C), MCImetro Access Transmission Services LLC (U 5253 C), MCI Communications Services, Inc. (U 5378 C), and Cellco Partnership (U 3001 C) d/b/a Verizon Wireless.

Utilities Code Section 583 by ignoring its requirement that confidential utility information in the possession of the Commission may be released only via an "order" of the Commission or by the Commission or a Commissioner in the course of a hearing or proceeding. This requirement applies to all information furnished to the Commission by a public utility, including documents previously submitted to the Commission and accepted as confidential. The Draft Resolution also improperly delegates substantive activities and discretionary authority to staff without adequate oversight or direction. Moreover, the Draft Resolution would impose unreasonable burdens on parties attempting to comply with the proposed confidentiality protocols, without a demonstrable benefit to the public. In several key respects, the Draft Resolution is also unclear as to whether it is adopting final rules or merely setting forth proposals.

The members of CIC operate in highly-competitive markets in which information about other market actors can confer a tangible competitive edge. CIC's members also submit significant amounts of confidential, competitively-sensitive financial and strategic information to the Commission. CIC is deeply concerned that the approach reflected in the Draft Resolution will create unfair competition and market distortions by exposing financial, marketing, and other confidential and proprietary information to public view. CIC could have supported a targeted resolution addressing the confidentiality status of safety-related records, which initially appeared to be the underlying impetus of the Draft Resolution. However, CIC cannot support the latest version of the Draft Resolution, as it has snowballed into an unwieldy and legally-flawed tome. The Draft Resolution injects more confusion into this area than it resolves and unlawfully seeks to disclose sensitive information for which utilities have a reasonable expectation of confidentiality.

CIC urges the Commission to withdraw the Draft Resolution in its entirety and reexamine the issues presented therein in a formal rulemaking. A formal proceeding would allow for a more rational consideration of the alleged problems with the Commission's confidentiality standards and public access procedures. To the extent that evidence is provided demonstrating the existence of problems, parties could proactively propose solutions through an appropriately-scoped and noticed process presided over by an Administrative Law Judge ("ALJ") and an Assigned Commissioner. The gravity and complexity of the issues raised in this Draft Resolution warrant consideration through the Commission's formal administrative process. Accordingly, the Legal Division should reformulate this inquiry as a draft Order Instituting Rulemaking ("OIR") for the Commission's review.

II. THE COMMISSION SHOULD EXAMINE THESE ISSUES IN A RULEMAKING INSTEAD OF THROUGH RESOLUTIONS, WORKSHOPS, AND DELEGATION OF DISCRETIONARY ACTIVITIES TO STAFF.

As TURN, DRA, CALTEL, and CIC have previously explained, the ambitious proposals and far-ranging implications of the Draft Resolution would be more appropriate for a formal proceeding. The Draft Resolution proposes a course that would modify – and in many respects, reverse – a Commission General Order and fundamentally alter the Commission's standards for determining the confidentiality to be applied to utility documents held by the Commission. The Draft Resolution claims, without any record support, that there are problems with public access to documents, that too many utility documents are designated as confidential, and that greater uniformity in resolving confidentiality disputes can be attained by the preparation of detailed "matrices." Rather than establishing a formal rulemaking to evaluate existing Commission orders, procedures, and standards related to confidentiality, the Draft Resolution envisions a series of workshops, subsequent resolutions, and a confusing set of tasks delegated to staff

without sufficient Commission oversight. None of these are a proper substitute for a formal proceeding.

The Draft Resolution should be withdrawn and replaced with a draft OIR for the Commission's consideration. As enunciated in Public Utilities Code Section 1701, "all hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission . . . ." This examination of public access and document confidentiality has clearly advanced beyond an informal Commission activity, and it should not circumvent the procedural protections and guidelines in the Commission's Rules of Practice and Procedure and Public Utilities Code Section 1701, *et seq.*

Commission General Orders are rarely modified through resolution. Almost without exception, the substantive revisions to General Orders affecting communications utilities have been addressed through formal proceedings. In the years since the 1996 Telecommunications Act, the Commission has revised the following General Orders, in each case in a rulemaking: G.O. 24-C (R.11-03-007), G.O. 77-M (R.03-08-019), G.O. 95 (R.08-11-005), G.O. 96-B (R.98-07-038), G.O. 133 (R.02-12-004), G.O. 153 (R.04-12-001, R.06-05-028, R.11-03-013), G.O. 156 (R.09-07-027), and G.O. 159A (R.90-01-012). Three new General Orders have also been adopted during that time, each through a formal proceeding: G.O. 168 (R.00-02-004), G.O. 169 (R.06-10-005), and G.O. 170 (R.06-10-006).[5] In the telecommunications arena, only the General Order addressing processing of interconnection disputes (G.O. 171) and the General Order describing the Section 851 advice letter program (G.O. 173) were adopted by resolution, and

[5] G.O. 170 was subsequently vacated following rehearing.

each of those items involved a longstanding Commission policy that was modified slightly and memorialized in a General Order.[6]

By contrast to the many examples where formal proceedings have been utilized to change General Orders, resolutions have generally been used for smaller changes to General Orders, ministerial items, implementing requirements in Commission decisions, and processing items that the Commission has already determined will be addressed by an industry division.[7] For example, resolutions are commonly used for resolving Eligible Telecommunications Carrier requests, Tier III advice letters, and for setting the budgets and surcharges for the various public policy funds. Resolutions have also been used to effectuate smaller changes to General Orders or changes to General Orders within an established policy direction as set forth in a Commission decision. For example, Resolution T-17321 modified G.O. 153 consistent with policies established in D.10-11-033, a decision that resulted from the LifeLine proceeding (R.06-05-028). Similarly, Resolution T-17327 effected targeted changes to the service protocols for telecommunications advice letters.[8] Even the procurement matrices that the Draft Resolution seeks to use as a model were adopted in a proceeding. *See* D.06-06-066.

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[6] Interconnection rules received significant attention in the Commission local competition docket (R.95-04-043), and Section 851 standards were developed through a series of Commission decisions over a period of many years.

[7] The prior iterations of G.O. 66 were adopted through resolutions in 1967 and 1974. Without conceding that these resolutions were lawful, CIC notes that in the 37 years following the adoption of G.O. 66-C, the Commission has demonstrated a clear trend of implementing significant changes to General Orders through formal proceedings. Moreover, the confidentiality concerns underlying G.O. 66 have dramatically increased since 1974. The last revisions to G.O. 66 were before the advent of competition in the telecommunications industry, and long before the birth of the Internet. Even if they were not examined in a proceeding in 1974, the confidentiality issues raised in G.O. 66 clearly merit a formal proceeding today.

[8] The process surrounding the adoption of Resolution T-17327 in itself demonstrates the perils of relying on the Draft Resolutions to modify General Orders. The original version of Resolution T-17327 would have involved a burdensome and unnecessary new set of service requirements, a proposal that was adopted without industry input. Ultimately, following a workshop and further input from several members of CIC, a more workable and mutually-satisfactory solution was reached. If this issue had been presented in a rulemaking, the solution could have been reached in a more orderly manner without the need for last-minute advocacy and hold requests from the (footnote continued)

The complex and controversial nature of the issues raised in the Draft Resolution should be examined in a rulemaking rather than through a series of informal activities. The Draft Resolution is now nearly 200 pages, and contains 22 Findings of Fact, 124 Conclusions of Law, and 13 Ordering Paragraphs announcing future events and a myriad of tasks for staff to pursue. This Draft Resolution is far longer than even the most substantive industry division resolutions. It contains dozens of pages of unnecessary legal conclusions about controversial topics that should be formally briefed rather than addressed through comments on a Draft Resolution. Similarly, it presents a number of "proposals" that would be more appropriate for an OIR, where all parties would be permitted to offer formal suggestions regarding the direction and scope of the analysis. *See, e.g., Draft Resolution*, at pp. 1-2. The length, structure, and style of the Draft Resolution confirm that its content is more appropriate to a formal rulemaking.

Moreover, Public Utilities Code Section 1701.1(c)(1) clearly contemplates that cases to "establish policy, including, but not limited to, rulemakings and investigations which may establish rules affecting an entire industry" should be adjudicated in quasi-legislative proceedings, with the due process and public policy and statutory requirements afforded to participants by the statute. The scope of the Draft Resolution goes far beyond the creation of rules affecting an entire industry – it affects all Commission-regulated industries – yet it does not recognize these statutory due process requirements.

The Draft Resolution dismisses calls for a rulemaking by asserting that "[i]t is not clear . . . that a switch to a Rulemaking would result in a more useful or acceptable final product." *Draft Resolution*, at p. 99. CIC disagrees with the premise underlying this statement,

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telecommunications industry. The more substantial the changes to a General Order are, the more necessary a rulemaking becomes.

which is that providing due process to the parties affected by these proposed changes will undermine the "usefulness" or "acceptability" of any new confidentiality rules. On the contrary, further scoping of the issues and a more structured deliberative process will assist in the development of appropriately-streamlined changes to the Commission's rules to the extent that changes are necessary to respond to identified problems. The formal rulemaking process is best suited to reach reasonable outcomes while providing full notice and an opportunity for parties to be heard.

The Draft Resolution also attempts to minimize the advantages of a formal process by suggesting that "the provision of notices and opportunities to comment . . . can also be provided outside the context of a formal Rulemaking." *Draft Resolution*, at p. 99. While CIC appreciates the opportunities provided to comment on each version of the Draft Resolution, this process is no substitute for a formal proceeding. Commission rulemakings have several tangible advantages that provide for a more robust examination of issues.

First, a rulemaking must be initiated through an OIR that must be adopted by the full Commission prior to commencement of the inquiry. OIRs are structured to raise issues, not to reach conclusions, so they facilitate a more rigorous consideration of whether sufficient problems exist to merit Commission action. The Draft Resolution presents the parties with recommendations, not issues. As a result, the parties must focus on addressing the propriety of proposed solutions without any consideration of whether a problem even exists. CIC questions whether there is a problem that would justify the sweeping action proposed in the Draft Resolution, and the process to this point has simply not provided an opportunity to challenge that premise.

A better path forward to address the confidentiality issues in the Draft Resolution would be to outline the alleged problems that are motivating the changes to G.O. 66-C in an OIR and seek comment on the extent to which these issues merit changes in Commission policy. If change is necessary, comments could be solicited regarding how to constructively address the identified problems. There may be a variety of alternatives that might be preferable to the Draft Resolution's approach. This more comprehensive examination of the issues in a rulemaking would be far superior to the Draft Resolution's unstructured set of sequential proposals that continue to change in scope and content without any clear identification of a problem that needs to be resolved.

Second, a formal Commission rulemaking would have a defined scope to facilitate an ordered consideration of the issues. The OIR would define the initial scope, and ultimately a Scoping Memo would be produced that gives the parties appropriate notice of what is at stake and the schedule for its examination. Both the Commission and the parties must abide by the scope of the proceeding as defined in the Scoping Memo. *See* S*outhern California Edison Co. v. Public Utilities Comm'n*, 140 Cal.App.4th 1085, 1104-1107 (2006) (annulling a CPUC decision to the extent that it addressed a prevailing wage issue outside the scope of the proceeding). The Legal Division's current approach of addressing confidentiality issues – in a series of Draft Resolutions – has no defined scope of the matters to be addressed, which in itself undermines due process and the statutory requirements for Commission proceedings in Section 1701, as well as the Commission's Rules of Practice and Procedure.

This most recent Draft Resolution raises substantive issues not covered by the original Draft Resolution, including a new section of Proposed G.O. 66-D addressing compliance with the California Information Practices Act ("CIPA"). *See Proposed G.O. 66-D*, § 5, *et seq.*

Further, the Draft Resolution now proposes to create an "advice letter database," a proposal absent from the previous two versions of the Draft Resolution. *See Draft Resolution*, at pp. 31-32. It is impracticable and procedurally improper to expect parties to participate in a process that has no defined scope and where new requirements, provisions, and issues continue to be added throughout the process. Initiating an OIR would rectify this.

Third, if these issues were addressed through a rulemaking, there would be an ALJ assigned to the case to act as a neutral arbiter, as well as an Assigned Commissioner to guide the policy direction on behalf of the Commission. In the informal process surrounding the Draft Resolution, Legal Division is acting as advocate and judge. Ultimately, Legal Division would also enforce the modified rules. Legal Division certainly has valuable information to contribute to this discussion, but this input would be more objectively considered and weighed against other parties' perspectives if filtered through a process administered by an ALJ and an Assigned Commissioner.

Fourth, rulemakings have formal service lists and lists of interested parties. There have been numerous problems with members of CIC and other parties not receiving notices related to the Draft Resolutions. This problem would be solved by initiating a formal rulemaking. In addition, absent a formal designation of parties, the parties do not know who the other interested players are, which can make constructive collaboration and settlement discussions difficult.

Fifth, parties to rulemakings are permitted to submit evidence, participate in hearings, and test evidence supplied by other parties. The Draft Resolution presents its discussion as though it involves strictly legal issues, but there are factual and policy issues implicated by this inquiry that could trigger opportunities for the presentation of evidence. For example, CIC has analyzed the California Public Records Act ("CPRA") data reflecting requests for the past five

years, and those data suggest that very few requests for information relate to telecommunications matters. *CIC Comments*, at pp. 7-8 (July 27, 2012). Parties should be permitted to test the factual propositions in the Draft Resolution suggesting that there is a problem with public access to documents. Moreover, communications providers may wish to provide expert testimony or other evidence about the sensitive nature of certain documents or the competitive harm resulting from their disclosure. The creation of a formal record helps protect against arbitrary and capricious agency action by linking findings to evidence that is clearly identified and subject to examination by the parties.

Sixth, from a purely pragmatic perspective, draft resolutions may not receive the same level of input from Commissioners that is attendant to Commission decisions. As noted above, each of the previous significant revisions to the major General Orders affecting communications companies have been evaluated in a formal proceeding. Each of those proceedings began with an OIR, and had an ALJ, an Assigned Commissioner, a Scoping Memo, a service list, and a record. This important and competitively-sensitive matter should be no different.

III. THE DRAFT RESOLUTION FAILS TO CORRECT PREVIOUSLY-IDENTIFIED LEGAL ERRORS AND ADDS NEW LEGAL ERRORS.

The many legal errors and incorrect presentations of the law in the Draft Resolution underscore the need for a rulemaking. A formal proceeding would provide the appropriate procedural apparatus for a comprehensive and balanced look at the confidentiality and public access issues raised by the Draft Resolution, while also accounting for legal constraints on the Commission's authority.

A. The Draft Resolution Violates Section 583 by Ignoring the Requirement of a Commission "Order" for Release of Confidential Utility Information in the Possession of the Commission.

Conclusion of Law 85 and the related provision in the body of the Draft Resolution are unlawful and should not be adopted. Any change to the Commission's rules for handling confidential information submitted by public utilities must comply with Public Utilities Code Section 583. The Commission may not repeal Section 583 by rule or regulation, or "interpret" it in a manner that disregards the ordinary and plain meaning of the statute. Yet that is precisely what the Draft Resolution would do.

Specifically, the Draft Resolution concludes – wrongly – that the Commission has the authority to adopt "broadly applicable regulations regarding disclosure of records or information in the custody of the Commission that provide that the CPUC's records are public, with limited exceptions." *Draft Resolution*, at p. 124 (Conclusion of Law 85). This legal conclusion contradicts the plain language of Section 583, which states "no information furnished to the commission by a public utility . . . shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding."[9]

The statute clearly states that confidential utility information may be disclosed only on "order" of the Commission or by the Commission or a Commissioner in the course of a hearing or proceeding. The Commission cannot disregard this statutory requirement. Nor can the Commission evade Section 583 by reading the word "order" so broadly as to effectively repeal the statute by interpretation. The Draft Resolution argues that the Commission's authority to

[9] The only exception provided in Section 583 is for "matters specifically required to be open to public inspection" under the Public Utilities Code, an exception that does not apply here.

"order" the public disclosure of confidential information is "unrestricted," and so the Commission may do so by "broadly applicable regulation." *Draft Resolution*, at p. 48 (*quoting Southern California Edison Co. v. Westinghouse Electric Co.*, 892 F.2d 778, 783 (1989).[10] But this argument violates a cardinal rule of statutory interpretation requiring compliance with "the actual words of the statute, giving them a plain and commonsense meaning." *Garcia v. McCutchen*, 16 Cal. 4th 469, 476 (1997). Adopting a standing "order" that reverses the requirements of Section 583 – as the Draft Resolution contemplates – would contradict the plain and common sense meaning of the statute. Only a Commission decision or resolution that properly applies the law to the facts of a specific case could constitute such an "order."[11]

For these reasons, Conclusion of Law 85 is unlawful and it should not be adopted. The discussion of Section 583 in the body of the Draft Resolution is similarly unlawful.

B. The Draft Resolution Results in Improper Delegation of Duties to Staff.

As CIC noted in comments on earlier versions of the Draft Resolution, the Commission may not delegate powers that involve the exercise of discretion to staff in the absence of explicit statutory authorization. *See Cal. Sch. Employees Ass'n v. Pers. Comm'n*, 3 Cal.3d 139, 144 (1970) (holding that powers conferred upon public agencies and officers which involve the

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[10] The Draft Resolution's reliance on *Westinghouse* is beside the point. In that case, the court held that Section 583 does not provide an independent privilege against disclosure of confidential information since the Commission may authorize disclosure by order. But CIC is not arguing that Section 583 creates an independent basis for nondisclosure, but rather, that Section 583 requires a Commission "order" before it may release confidential utility information in its possession. Only a Commission decision or resolution that properly applies the law to the materials in question could constitute such an "order."

[11] The Draft Resolution argues that previous versions of G.O. 66 "reinforce[] the principle that the CPUC can issue orders covering broad classes of records." *Draft Resolution*, at p. 35. CIC does not concede that these earlier versions of G.O. 66 were lawful. The Draft Resolution points out that there were no legal challenges to these earlier changes to G.O. 66, but the lack of challenges (if indeed there were none) does not immunize these enactments against statutory compliance. Moreover, G.O. 66-B was last in place in 1974, which was long before the confidentiality issues of the current communications market came into play. In this era of identity theft, corporate espionage, unfair competition, over-exposure, and a heightened focus on privacy, confidentiality should be a bigger concern, not a smaller one.

exercise of judgment or discretion cannot be surrendered or delegated to subordinates in the absence of statutory authorization). Specifically, although the Commission may delegate the performance of "ministerial tasks, including investigation and determination of facts preliminary to agency action," it cannot delegate duties that require judgment or discretion. *Id.* at 144 (emphasis added); *see also Bagley v. City of Manhattan Beach,* 18 Cal.3d 22, 24 (1976).

Whether to make utility records or information public or not requires an exercise of discretion, which the legislature has vested solely in the Commission (or assigned commissioner during a hearing). In fact, Section 583 prohibits Commission employees or officials from making such records public.[12] The Draft Resolution would allow staff to make certain documents and information public without a Commission order or ratification "in some situations where a matrix or other authority clearly requires disclosure." *See Draft Resolution*, at p. 37. This delegation is improper and violates Section 583.

Section 3.2(5)(b)(3)(c) of Proposed G.O. 66-D provides that if staff has identified records or information as falling within a "public category of records," it shall ask the requester of confidential treatment for more information as to why the records of information are confidential. If staff is not satisfied, Proposed G.O. 66-D indicates that staff may – pursuant to a subpoena or records request – disclose the records or information "with no further delay." *Proposed G.O. 66-D* § 3.2(5)(b)(3)(c). Even when a requester of confidentiality seeks Commission review of the initial staff determination within the requisite timeframe, the request would not automatically stay disclosure of records if staff determines that a law or commission order or rule "clearly and expressly" requires such material to be public. *Proposed G.O. 66-D* §

[12] Section 583 states that "[a]ny present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor." Pub. Util. Code § 583.

3.2(5)(b)(3)(c). The staff determination contemplated by Proposed G.O. 66-D would be irreversible in today's electronic age where improper disclosure of information is impossible to fully rectify.

The Draft Resolution attempts to justify its general delegation of duties by arguing that the Commission has previously delegated to staff determinations requiring exercise of judgment, such as where staff determines confidential treatment of information submitted through advice letters. *See Draft Resolution*, at pp. 86-87. Notably, however, under the Commission's advice letter procedures in G.O. 96, a party seeking confidential treatment can seek review of a staff decision from the ALJ Division, during which time the information cannot be made public. Moreover, even with ALJ Rulings, parties may seek reconsideration from the full Commission.[13] The above section of Proposed G.O. 66-D provides for no such review, nor does it provide any protection once a document is submitted to the Commission with a request for confidentiality.

The Draft Resolution suggests that the Commission retains "responsibility for fundamental policy decisions" and that staff will have sufficient guidance from the law and the contemplated database of its orders and resolutions, presumably to find in certain cases that a law or authority "clearly and expressly" requires disclosure. *Draft Resolution*, at p. 82. Such reasoning ignores Section 583's express mandate that the Commission itself exercise the discretionary power of ordering utility information to be public. In cases of express legislative intent, the California Supreme Court has noted that while functions related to established standards may be delegated, the "the ultimate act of applying the standards . . . is legislative in

[13] *See* Rule 13.6 of Commission's Rules of Practice and Procedure. Outside of a proceeding, a party must be given a procedural mechanism to bring a confidentiality determination before the Commission. G.O. 96 contemplates that parties may challenge staff conclusions regarding confidentiality by appealing to the ALJ Division, and any decision from an ALJ is subject to appeal before the full Commission.

character, invoking the discretion of the [agency]." *Bagley, at 24.* The discretionary functions envisioned by the Draft Resolution cannot be delegated.

The Draft Resolution incorrectly presumes that staff can find that certain information "clearly" is public on a "ministerial" basis. The gathering of facts related to a confidentiality request could be ministerial, but the application of law or authority to these facts require discretion. In particular, determining whether a law or the Commission "clearly and expressly" requires that certain information be public certainly would require the exercise of judgment and discretion. *See Proposed G.O. 66-D* § 3.2(5)(b)(3)(c). As the Draft Resolution recognizes, even within an industry, two utilities may treat similar information differently. In these cases, there will not be a pre-prescribed designation that can simply be "looked up" in a confidentiality matrix.[14] Proposed G.O. 66-D would improperly delegate these considerations to staff.

The only way to safeguard against potential violations of Section 583 and improper delegation of discretionary power is by requiring the staff to present its preliminary determination to the Commission for ratification in all cases. In *Bagley*, the Court invalidated an initiative allowing an arbitrator to determine city salaries based on the existence of a law requiring a city council alone to set salaries. *Bagley*, at 24. The Court identified this as a discretionary function, reasoning that: (i) the Legislative intent was for the city council to determine salaries; and (ii) there were "no safeguards in the proposed initiative to prevent abuse of the arbitrator's power." *Id.*

[14] For example, within the communications industry, companies that are rate-regulated may be accustomed to disclosing their intrastate telecommunications revenues, but other competitive communications providers view their intrastate revenues as highly-sensitive and proprietary information. Because of these varying perspectives, the potential for misapplication of existing categories is significant, and implicates the exercise of judgment. In some cases, these questions even implicate higher-level policy determinations.

Such safeguards are critical. Last year, highly-confidential intrastate revenues for various communications providers were disclosed improperly. If such erroneous disclosures of confidential information could occur under the current Commission policy, which requires Commission approval prior to disclosure, even more errors are likely to occur under a process where staff is empowered to make decisions under the illusion that they are undertaking only ministerial tasks.

C. The Draft Resolution Would Improperly Disturb the Status of Documents Already Accepted by the Commission as Confidential.

The Draft Resolution improperly concludes that the Commission may retroactively release or disclose information previously designated as confidential. *Draft Resolution*, at pp. 91-93. Even when documents submitted pursuant to Section 583 and G.O. 66-C are "perfectly appropriate," the Draft Resolution claims that there is no "vested right" nor "objectively reasonable expectations" of confidential treatment, and "the CPUC may decide to authorize disclosure" regardless of how long ago the information was submitted or how much reliance the provider has on the confidential status. *Draft Resolution*, at p. 92.

The Draft Resolution is plainly wrong. In Resolution L-272, the Commission identified the circumstances that create a reasonable expectation of confidentiality when it refused to release the names of victims and witnesses of utility accidents. The Commission noted it had historically declined to automatically make such information public, stating "our past decision to not make accident reports automatically public (D.96-09-045), gave victims and witnesses who were aware of these authorities an objectively reasonable expectation of privacy in the personal information in such reports." Resolution L-272, 1998 Cal. PUC LEXIS 1123 (1998), at n.4 (*citing* Resolution L-265, at pp. 20-25.) Similarly, carriers have an objectively reasonable expectation of confidentiality based on their knowledge that when information has been

submitted as confidential, it would not be publicly disclosed (even when no formal order determining confidentiality status has been issued) absent a Commission ordering such disclosure.

The Draft Resolution disregards carriers' reasonable expectations of privacy and implies the Commission may begin actively disclosing information previously submitted as confidential, regardless of whether any request has been made for the information, so long as the Commission provides "some notice of [its] intentions." *Draft Resolution*, at p. 92. Such a wholesale reversal of the Commission's prior, long-established practice of according confidential treatment is improper and far in excess of the Commission's obligations under the CPRA. Unless the Legislature expressly provides for retroactive operation, no statute is intended to have retroactive effect, and it will not be given that effect. *Krause v. Rarity*, 210 Cal. 644, 655 (1930); *Subsequent Injuries Fund v. Indus. Acc. Comm'n*, 48 Cal.2d 355, 362 (1957). It does not matter that a statute is intended to be remedial or curative in character; retroactive application is barred if there is not an express legislative mandate. *Subsequent Injuries Fund*, 48 Cal.2d at 361-62. In *Subsequent Injuries Fund*, the agency argued that an amendment to a workers' compensation law should apply retroactively to injuries occurring prior to the enactment date of the statute. The court rejected the interpretation as unsound, notwithstanding the fact that the statute was based on legislative declarations and findings concerning public policy and public welfare, and the inequity existing under the law prior to the amendment. *Id.* The language of the statute must explicitly invoke retroactivity for it to have retroactive effect.

Public Utilities Code Section 583 does not require or authorize the Commission to publicly disclose information previously submitted and accepted as confidential. Indeed, the text authorizing the Commission to disclose information "in the course of a hearing or proceeding,"

makes clear that the Legislature expected that such disclosures would be contemporaneous or forward-looking only. Nothing in Section 583 implies, much less authorizes, disclosures of information that has been previously accorded confidential treatment (whether by affirmative decision or not). Similarly, the CPRA includes no requirement or authorization for disclosure of information that has been previously accorded confidential treatment.

Regardless of whether Section 583 or the CPRA allow for disclosure of information previously submitted as confidential, there is clearly no requirement or authorization under either statute for the Commission to take affirmative steps to identify and disclose information previously submitted as confidential but for which no official determination was made. Indeed, Section 5263 of CPRA expressly requires public access to agency records only in instances where a request for the information has been made. Cal. Gov. Code § 5263.

D. The Draft Resolution Imposes Improper Burdens on Utilities Relative to Invocation of Statutory Privileges, Including the Attorney-Client Privilege.

The Draft Resolution contains an expanded discussion of the law of privilege. As cast by the Draft Resolution, this discussion is to serve as a warning to entities who may invoke a statutory privilege against disclosure:

> The Resolution and Draft G.O. 66-D include cautions about privilege claims not because we plan to disregard privileges, but because we know there are many facets to privilege analysis.

Draft Resolution, at p. 59. In providing such "cautions" and discussing the various "facets" of a privilege analysis, the Draft Resolution misapplies the principles of statutory privilege. As a result, it sets forth a construct that would impose impermissible burdens on utilities seeking to invoke a statutory privilege. This analysis reflects a misunderstanding of the law that merits a further examination of the issues in a formal proceeding. At an absolute minimum, this erroneous discussion must be removed from the Draft Resolution.

Section 2.2.2.2 of Proposed G.O. 66-D assigns a burden to any person invoking a privilege to establish that the privilege applies to the information or records in the context in which the privilege is asserted or confidential treatment is requested. Once the burden is met, however, the party is not required under law to disclose the privileged information to the Commission. *Costco Wholesale Corp. v. Super. Ct.*, 47 Cal.4th 725, 732 (2009) (stating the attorney-client privilege is absolute and disclosure may not be ordered once the burden of proof is met). Where a utility supports a privilege allowing it to withhold the information, that should be the end of the analysis – the asserting party should not be subject to any additional burden.

Contrary to these established legal principles, Section 2.2.2.2 would impose the following additional requirements, thereby creating secondary burdens of proof:

> If a privilege holder's provision of privileged records to the CPUC might result in a waiver of the privilege, such as may be the case with regard to records subject to the lawyer-client privilege set forth in Cal. Evid. Code § 950 *et seq.*, the privilege holder shall, before providing such records, either: 1. explain why the provision of the privileged records would not result in a waiver of the privilege, in accord with the statutes and case law regarding waiver; or 2. demonstrate to the CPUC's satisfaction that the records would, if provided to the CPUC, fall within the Cal. Evid. Code § 1040 (a) definition of "official information," and be subject to the CPUC's assertion of absolute official information privilege in Cal. Evid. Code § 1040(b)(1) for information subject to federal or state law prohibiting disclosure; or the conditional official information privilege in Cal. Evid. Code § 1040(b)(2), which may be asserted by the CPUC where there is a need for confidential treatment that outweighs the necessity for disclosure in the interests of justice, with certain exceptions. The privilege holder must explain how the public interest would be served by the CPUC's assertion of the CPUC-held privilege.

The Draft Resolution puts forth a strange and tortured argument to support its view that privileges are contingent upon the secondary burdens of proof at the Commission described above. Using the attorney-client privilege as its example, the Draft Resolution makes the remarkable statement that if the Commission agrees the burden is met, the Commission is still

"not compelled to accept the privileged information, or to accept it subject to the privilege holder's conditions." *Draft Resolution*, at p. 58. The remainder of the paragraph, void of any citation to legal authority, declares that a claim of privilege – even one for which the Commission agrees the burden is already met – may hinder effective or transparent decision making. The paragraph further concludes that the party claiming privilege "should be prepared to show that it can provide the information and still assert the privilege, and/or that the CPUC holds a privilege or other basis for protecting the confidentiality of such information." *Draft Resolution*, at p. 58.

This reasoning is based on a fundamental misunderstanding of the principles governing statutorily-privileged information. California Evidence Code Section 915, the authority relied upon by the Draft Resolution for its ability to review privileged attorney-client materials, does not contemplate the wholesale and voluntary disclosure of the documents for which privilege is claimed and found proper. If the Commission were called upon to conduct an in camera review of documents for which a claim of privilege is asserted, and if the documents are found to be within the attorney-client privilege, a utility would not have to disclose the documents. The Draft Resolution makes the nonsensical presumption that a utility would voluntarily disclose information that is already subject to a valid privilege. The assertion of the privilege necessarily makes any subsequent disclosure involuntary.[15]

[15] The Draft Resolution and accompanying Proposed G.O. 66-D also confuse the rules and process for seeking confidential treatment of information with those governing statutory privilege. In this regard, Section 2.2.4. of the Proposed G.O. sets forth the "Minimum Requirements for Requesting Confidential Treatment." Section 2.2.4.5 requires a utility to identify the specific privilege, if any, applicable to the information the utility seeks to protect, and provide a detailed explanation of how the privilege applies to the information, while Section 2.2.4.6 requires a utility to identify any specific privilege the Commission holds that would prevent disclosure of the sensitive information. These requirements are illogical, as material for which it is necessary to seek confidential treatment is by definition not privileged. Privileged material is statutorily protected from disclosure.

Even if it were not legally flawed, Section 2.2.2.2 of Proposed G.O. 66-D would impose an impermissible burden on utilities. Because documents for which the utility claims a statutory privilege will not be voluntarily disclosed, and because the Commission would only view these documents in camera when no other option for determining the applicability of the claimed privilege is available, the first requirement that the utility demonstrate why disclosure will not waive the privilege is logically inoperative. The second requirement that the utility show the Commission holds a separate "official information" privilege under the Evidence Code is equally inapposite. Finally, the requirement that the privilege holder – to whose information all parties now agree the privilege applies – must explain how the public interest would be served by the Commission's assertion of a Commission-held privilege, itself furthers no public interest. The existence of a Commission-held privilege is irrelevant, so imposing this process on parties would be pointless and unduly burdensome.

The provisions of the Draft Resolution and Proposed G.O. 66-D relating to treatment of statutory privilege are contrary to law and should not be adopted.

IV. THE NUMEROUS PROCESSES SET FORTH IN THE PROPOSED GENERAL ORDER 66-D ATTACHED TO THE DRAFT RESOLUTION ARE DUPLICATIVE, CONVOLUTED, AND IMPOSE UNREASONABLE BURDENS ON THE COMMISSION AND THE UTILITIES.

While CIC appreciates the Commission's decision to postpone adoption of any new General Order 66-C until after completion of workshops, the fact of the matter is that Proposed G.O. 66-D has been and continues to be a disastrous "solution" to a problem that does not exist. The Draft Resolution acknowledges the processes set forth in the July version of Proposed G.O. 66-D create new burdens, but then it proposes additional procedures that only amplify the procedural flaws and burdens of the processes imposed by the proposal. *Draft Resolution*, at p.

30. Even setting aside its fatal legal flaws, the Draft Resolution's approach to public access and documentary confidentiality is not workable.

The intent of Proposed G.O. 66-D is (1) to "streamline public access to records and information" and (2) to correct the Commission's existing processes and the rules in G.O. 66-C that the drafter of the Draft Resolution believes to be flawed. *Draft Resolution*, at p. 1. As CIC has explained previously, the imposition of an elaborate regulatory framework for processing public record requests is not necessary for communications carriers because the Commission only receives a few such requests on an annual basis. *CIC Comments*, at p. 3 (July 27, 2012). Furthermore, CIC's previous comments describe how the Commission's existing processes already satisfy the requirements of the CPRA. *CIC Comments*, at p. 8 (April 25, 2012). The Draft Resolution continues to assert that a dramatic and large-scale overhaul of the Commission's existing processes must be implemented to include industry-specific matrices, various types of resolutions (status resolutions and Public Records Office resolutions ("PRO Resolutions"), monthly advice-letter filings, and numerous forms to be completed when utilities submit documents to the Commission. It thereby threatens to create a morass of regulatory burdens for the Commission and carriers, as well as adding unnecessary delays to existing processes for providing documents to the Commission.

Proposed G.O. 66-D exacerbates the procedural problems that were already present in the previous draft. As noted in CIC's previous comments, the July version of Proposed G.O. 66-D set forth "an unnecessary and convoluted process for seeking protection of materials in those situations where a specific Commission procedure has not been adopted." *CIC Comments*, at p. 4 (July 27, 2012). That process would have required utilities to complete forms requesting confidential treatment for all documents submitted to the Commission, and these requests would

be evaluated by the appropriate Commission division with a 10-day period for appeal of the division's decision to the Commission through the resolution process.

The July version of the Draft Resolution also contemplated a PRO Resolution process that could serve as a vehicle to place requests for confidential treatment and protests of such treatment directly before the Commission for action. Thus, as indicated in CIC's July Comments, it appeared that Proposed G.O. 66-D would institute two different procedures for processing requests for confidentiality – one involving a detailed process for staff review and another using the PRO Resolutions. *CIC Comments*, at p. 6 (July 27, 2012).

The Draft Resolution acknowledges parties' concerns about the complexity and pitfalls of this process. *Draft Resolution*, at p. 26. Nevertheless, the revised Proposed G.O. 66-D compounds the problem by adding yet more processes and procedures, most notably a requirement for monthly advice-letter filings for confidentiality requests and a new type of resolution based on the status of the utility. *Proposed G.O. 66-D* §§ 3.1.2.2, 3.1.2.3; *see also Draft Resolution*, at pp. 31-32, 95-98. These revisions increase the length of Proposed G.O. 66-D from 20 to 42 pages.

While it is difficult to understand the detailed descriptions of each of the processes contained in Proposed G.O. 66-D, many appear to be entirely duplicative. For example, Proposed G.O. 66-D includes the following procedures included in the July version of G.O. 66-D: (1) the process for submitting requests for confidential treatment to the appropriate Commission division; (2) the creation of industry-specific matrices designating confidential and public materials; and (3) PRO Resolutions that "may" serve as a vehicle for Commission

ratification of staff determinations.[16] The current Proposed G.O. 66-D also adds two more processes: a required monthly advice letter process for dealing with requests for confidentiality and a new Standard Public and Confidential Status Resolution ("SPCS Resolution") process. The current version thereby contemplates a myriad of unnecessary and burdensome regulatory processes to be followed to complete the simple task of designating a document as confidential.

The proposal to have industry-specific matrices and the SPCS Resolution is also duplicative. It would be a waste of resources to develop industry-specific matrices and then create determinations of the confidentiality status for the documents of each company. Furthermore, the existence of both will only create confusion; an industry-specific matrix could reflect that a document is public, but the SPCS Resolution could indicate that for a specific carrier, that document is confidential. Such duplicative processes are further examples of the infirmities in the Proposed G.O. and highlight the difficulties in deciphering Proposed G.O. 66-D into clearly-defined processes that could possibly be implemented.

While one response to the many infirmities of Proposed G.O. 66-D is to have the parties sort out all the problems at workshops, this is not a wise course given the experience at the previous workshop. At that workshop, it was very difficult to focus on specific issues and fully address each one in turn. Instead, the conversation jumped from topic to topic without coming to resolution on any issue. The results (or lack thereof) from the initial workshop lend further credence to the need for a rulemaking in which the issues are clearly scoped.

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[16] Proposed G.O. 66-D, Section 3.2.2 defines Public Records Office Resolutions as follows:
The Public Records Office will prepare and place on the agenda of each CPUC business meeting agenda a proposed Public Records Office resolution identifying requests for confidential treatment that identifies requests for confidential treatment received during a given period, and the status of the requests. This Public Records Office resolution will authorize public access to all information provided by regulated entities to the Commission during the period covered by the Public Records Office resolution where confidential treatment was not requested, and may authorize public access to information furnished by regulated entities where a request for confidential treatment was rejected or denied.

If the Commission decides not to initiate a rulemaking, CIC submits that Proposed G.O. 66-D must not be part of any Commission-approved resolution. Including the Proposed G.O. as part of the resolution will only create confusion and frustrate the purpose of the workshop. Furthermore, given the tangled and overly-elaborate structure of Proposed G.O. 66-D, foisting it upon the parties as a starting point will lead to wasted resources in trying to distill it into rationale elements. Finally, although Proposed G.O. 66-D is acknowledged as a draft at this point, its attachment to the resolution gives it an imprimatur of legitimacy that is wholly inappropriate given its many flaws. Its inclusion suggests the Commission itself has reviewed and supports the G.O. 66-D as drafted, and, as such, the Legal Division will expect that the draft should therefore be given weight in the parties' negotiations at workshops. Given its severe infirmities, that clearly should not be the case. At a minimum, to avoid prejudicing the process and analysis of this issue, Proposed G.O. 66-D should not be included as an attachment to any resolution that may be adopted.

V. THE DRAFT RESOLUTION FAILS TO CLARIFY WHICH OF ITS PROPOSALS ARE FINAL AND WHICH PROPOSALS ARE CONTINGENT UPON FUTURE COMMISSION ACTION.

Given the many legal errors and administrative problems created by the Draft Resolution, it should be withdrawn and the issues should be reexamined in a properly-focused rulemaking. The numerous unclear and inconsistent proposals in the Draft Resolution further underscore the need for its rejection. The Draft Resolution presents several proposals that are either prejudged or prematurely adopted by the Ordering Paragraphs. Other proposals are discussed in the Draft Resolution without any apparent operative effect or appropriate purpose. If adopted as written, the meaning of the Draft Resolution would not be reasonably discernible.

The proffered suggestions in the Draft Resolution must not be adopted as Ordering Paragraphs. For example, the Ordering Paragraphs improperly direct staff to develop indexes

and databases despite the Draft Resolution's clear indication that these processes are "[p]roposed improvements to the public records process." *Draft Resolution*, at p. 1 (emphasis added). In recognizing an ongoing process, the Draft Resolution explains that "there are many details to be worked out regarding the scope of disclosures" and staff is directed to consider a "process of developing and recommending changes to [the CPUC's] policies for records disclosure and confidential treatment." *Draft Resolution*, at pp. 100-101 (emphasis added). As further evidence that these suggestions are merely proposals, the Draft Resolution recommends at least three workshops for stakeholders to discuss procedural processes, safety information, and industry-specific confidentiality issues. Nevertheless, the Ordering Paragraphs predetermine the outcome of staff and stakeholder efforts and pending workshops by conclusively directing staff to implement the Commission's proposals.[17] For instance, the Ordering Paragraphs state that "CPUC staff shall develop a publicly accessible index or database of requests for confidential treatment of records provided to the CPUC." *Draft Resolution*, at pp. 134-35. The Draft Resolution's proposal to formulate regulations with the input of stakeholders in workshops is disingenuous in light of the Ordering Paragraph's clear directives. These conclusions must be revised to recognize the continuing development of the Commission's proposals.

On the other hand, the Draft Resolution also raises a number of proposals for consideration without providing clarification on whether these suggestions will be implemented or further explored. Some appear to simply be statements of the Legal Division's opinion. For instance, the Draft Resolution suggests that "it may be possible to create a system though which a regulated entity, or group of entities, could request that the CPUC adopt a standard public and

[17] While we initially supported expedited adoption of the safety measures set forth in the initial Draft Resolution without workshops, the current Draft Resolution goes much further and widens the scope of the safety materials to be made public.

confidential status resolution that would address in a comprehensive manner the public or confidential status of classes of records." *Draft Resolution*, at p. 102. The Draft Resolution also indicates that "[i]t is worth exploring whether monthly reports identifying requests for confidential treatment . . . would provide an efficient framework for offering the public an opportunity review, comment on, or protest requests for confidential treatment." *Draft Resolution*, at p. 102. However, the Draft Resolution fails to address these suggestions in the Ordering Paragraphs and altogether fails to clarify whether these are merely proposals, points for discussion, or processes that will be implemented by the Commission.

Proposed G.O. 66-D creates further confusion by unnecessarily restating California statutes. In addition to the numerous direct references to the CPRA, Proposed G.O. 66-D was revised to include an eight-page restatement of the CIPA. *Proposed G.O. 66-D*, § 5, *et. seq.* Not only is the recital of already-existing state statutes superfluous, the incorporation of these statutes creates potential legal conflicts should the relevant statutes be revised or amended to deviate from the language drafted into Proposed G.O. 66-D. Furthermore, the late inclusion of provisions of CIPA creates further ambiguity as to the scope of the Draft Resolution and is neither necessary nor appropriate in Proposed G.O. 66-D. The Draft Resolution and Proposed G.O. 66-D must be revised to eliminate painstaking attempts to incorporate existing and applicable legal principles in a manner that would create ambiguities and confusion where none exists.

VI. CONCLUSION.

The Draft Resolution is legally flawed, ambiguous, and would impose unreasonable burdens on regulated utilities and participants in Commission proceedings. The Draft Resolution should be withdrawn. If the Commission wishes to consider the issues presented by the Draft Resolution further, they should be presented in a neutral manner in a draft OIR for the

Commission's consideration and evaluated in a formal rulemaking with all of the procedural protections attendant to such a proceeding.

Dated at San Francisco, California, this 11th day of January, 2013.

Respectfully submitted,

Mark P. Schreiber
Patrick M. Rosvall
Lisa P. Tse
COOPER, WHITE & COOPER LLP
201 California Street, 17th Floor
San Francisco, CA 94111
Telephone: (415) 433-1900
Facsimile: (415) 433-5530
E-mail: prosvall@cwclaw.com

By _____

Patrick M. Rosvall
Attorneys for the Small LECs and SureWest

On behalf of the Communications Industry Coalition